IN THE COURT OF APPEALS OF IOWA

No. 0-777 / 08-0403
Filed December 22, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JODY NOLAN McCULLAH,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom (pretrial motions) and Don C. Nickerson (pretrial motion, trial, and sentencing), Judges.

Jody Nolan McCullah appeals the judgment and sentence entered upon his convictions of sexual abuse in the second degree. **REMANDED WITH INSTRUCTIONS.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor (until withdrawal), Darrel L. Mullins, and Thomas Tauber Assistant Attorneys General, John P. Sarcone, County Attorney, and Jeff Noble, Assistant County Attorney, for appellee.

Jody Nolan McCullah, Fort Madison, pro se.

Heard by Eisenhauer, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes no part.

DOYLE, J.

Jody McCullah appeals the judgment and sentence entered upon his convictions of sexual abuse in the second degree. Upon our review, we remand with instructions.

***I. Background Facts and Proceedings*.**

On January 5, 2007, defendant Jody McCullah was arrested for the 1995 sexual assault of then thirteen-year-old C.P. Thereafter, McCullah was charged by trial information, later amended, with three counts of sexual abuse in the second degree. McCullah completed a financial affidavit seeking the appointment of counsel due to his indigent status, and an attorney from the Des Moines Adult Public Defender's Office was appointed to represent him.

In April 2007, McCullah attacked officers and attempted to escape while being held at the Polk County Jail on the sexual assault charges. As a result, McCullah was charged in a separate case with one count of escape and four counts of inmate assault. McCullah's attorney subsequently applied for a hearing to determine whether there was probable cause that McCullah should be evaluated for competency to stand trial under Iowa Code section 812.3(1) (2007). Following a hearing, Judge Eliza Ovrom found probable cause existed such that McCullah might be suffering from a mental illness and ordered a competency evaluation be performed.

After a psychiatric evaluation on May 3, 2007, a licensed psychologist opined McCullah was competent to stand trial. The psychologist's report stated McCullah indicated to the psychologist he had been diagnosed with anxiety, depression, schizophrenia, and attention deficit hyperactivity disorder (ADHD)

while he was in the Newton Correctional Facility. McCullah also stated to the psychologist that "he hears multiple voices in his head and that there is a neurotransmitter planted in his head," among other things. However, the psychologist found, based upon his review of McCullah's mental status, that McCullah's presentation of acute onset of psychiatric symptoms, especially at McCullah's age, did not appear credible. The psychologist explained:

> Much of the information [McCullah] provided appeared again to be manipulative in an attempt most likely to develop secondary gains with the legal system. There is a strong indication in this evaluation of malingering on [McCullah's] part. Based upon this, I believe he shows no limitations in his ability to understand the charges and allegations, his ability to appreciate the range, nature, and seriousness of the charges, his ability to understand the legal proceedings, his ability to disclose to his attorney facts necessary for his defense. . . .
>
> . . . . [McCullah's] psychiatric symptoms are reported in a very dramatic way but do not appear credible. Limitations in his reports of the legal process are also seen as not being credible. I would strongly suspect a possibility of malingering with this defendant.

Based upon this evaluation, the court found McCullah competent to stand trial.

In August 2007, McCullah's other charges proceeded to trial before Judge Ovrom. The court noted that immediately before and during trial that McCullah

> made several statements . . . that would appear on their face to be delusional. He made references to the CIA, stated he was an undercover agent for the FBI, and alleged "covert operations" in the Polk County jail. He also stated that he has a law degree.

Based upon McCullah's statements, the court, on its own motion, ordered another competency evaluation be performed. Although the court believed McCullah to be competent to stand trial, it ordered further competency testing in an abundance of caution. The court noted it believed McCullah's behaviors were

manipulative and done in a deliberate attempt to create an issue in the record concerning whether he was actually competent to stand trial.

On August 29, 2007, McCullah's appointed attorney received a letter from McCullah indicating he wished to represent himself. McCullah's attorney filed a motion for McCullah seeking to discharge him as the attorney and for McCullah to proceed pro se. The State filed a brief in response, arguing that due to McCullah's various episodes of misconduct, including his assaults while in jail, McCullah had forfeited or waived his right to represent himself in the matter.

A hearing on the motion was held in September 2007. There, McCullah told the court that he had

> had several psychological evaluations done by the Newton Correctional Facility. Iowa Medical Correctional facility conducted a psychological workup on me, and there was never any competency issues raised at that time. And there was never any competency issues raised at any of my other hearings as well.

The court stayed the proceedings and deferred its ruling until the competency evaluation was received.

McCullah's second evaluation was delayed due to unforeseen circumstances of the evaluator. A status hearing was held in November 2007, and the court selected another licensed psychologist to perform the evaluation. McCullah again argued he was competent to stand trial and to represent himself. However, the court continued the stay pending receipt of McCullah's competency evaluation.

On November 21, 2007, another licensed psychologist evaluated McCullah. The psychologist opined that McCullah was competent to stand trial and submitted a report on the matter. The report indicated McCullah stated to

the psychologist that he had been evaluated for his competency to stand trial several times and has always been found to be competent. The report also indicated McCullah stated to the psychologist

> that he has received mental health treatment in the past beginning at age [four] when he was treated for [ADHD]. He said that when he was incarcerated at the Newton Correctional Facility that he was diagnosed with anxiety, depression, schizophrenia, and [ADHD] and was prescribed Seroquel and Wellbutrin as treatment. He said that he took the medications for several months but began refusing them earlier this year.

The psychologist noted that on some occasions McCullah "evaded answering queries about his legal situation by stringing together large words and legal phrases in a way that conveyed very little but was presented with an air of self-satisfaction." The psychologist reported:

> [McCullah] appeared calm and self-confident during the interview, except for a few moments when mild irritation was apparent in his facial expression. His intellectual function is estimated to be in the average range. He did not show obvious deficits in his attention, memory and capacity for abstract thought. He denied hallucinations. *The content of his speech was consistent with the presence of paranoid thought processes and beliefs, including persecutory delusions. He displayed poor insight regarding the paranoid nature of his thoughts and beliefs and how they affect his reactions and responses*.

(Emphasis added). As to McCullah's ability to assist effectively in his own defense, the psychologist stated:

> [McCullah] showed mild impairment in his capacity to assist in his own defense due to his paranoid thoughts. These thoughts and beliefs interfere with his ability to work effectively with his attorney. He said he believes that he will fight for himself better than his attorney and he stated that he has a "firm grasp on Iowa law" from studying it while in jail. . . .
>
> In spite of his apparent delusions, he demonstrated no impairment in his capacity to communicate and make reasoned decisions regarding legal matters. He said that he would evaluate and consider a plea agreement if offered but that he thinks that he

> can win if he goes to trial because he is not guilty. He believes that he can win over a jury if he can establish a rapport with them.

The psychologist concluded:

> McCullah showed reasonable ability to appreciate and understand the charges against him and to understand the legal process and court procedures. It is less clear to what extent he has impairment in his ability to assist in his own defense. In my opinion, his thought processes are skewed due to a Paranoid Personality Disorder, which causes a mild impairment in his capacity to assist in his defense. The impairment is considered mild because he has the ability to communicate and reason effectively, but reports difficulty working with his present attorney, which interferes with his ability to be adequately represented. *[McCullah] also has prominent features of Antisocial Personality Disorder, including grandiosity, which causes him to overvalue his ability to represent himself and win his case at trial.*
>
> Mental health treatment is unlikely to change [McCullah's] paranoid and antisocial personality traits because these conditions are impossible to treat unless the patient is highly insightful and motivated to make changes, and [McCullah] is neither. A referral for psychiatric evaluation and treatment would be appropriate for treatment of his situational depression and treatment options for his paranoid thoughts may be offered.

(Emphasis added.)

After the court received the evaluation, a hearing was held on November 28, 2007. The court noted that the psychologist found McCullah competent to stand trial, and it then granted McCullah's request that his appointed attorney be permitted to withdraw from the case. The court appointed another attorney and requested that McCullah meet with that attorney before deciding whether he wanted to represent himself. McCullah stated:

> As far as pro se representation, I find that I'm perfectly competent to stand trial and represent my own interests in this case. I have studied the law considerably, and I am prepared to proceed pro se . . . .

The court then entered an order in accordance with its oral rulings setting the case for a status hearing and noting that it would appoint McCullah new counsel. New counsel was subsequently appointed.

A status hearing was held on December 5, 2007, and McCullah and his new counsel appeared. McCullah expressed that he still wanted to proceed pro se. The court then engaged McCullah in an extensive colloquy concerning his desire to represent himself in the proceedings. The following exchange took place concerning McCullah's mental health:

> THE COURT: Have you been diagnosed with mental health conditions?
>
> McCULLAH: Yes, there have been some diagnoses by the jail staff at Polk County main jail which have all proved to be competent.
>
> THE COURT: But what are you diagnosed with? For example, have you been diagnosed with ADHD or depression or paranoia or—
>
> McCULLAH: Yes, there was a residual ADHD which was not hereditary. It was an induced deficiency from a traumatic childhood experience which, according to the record, the doctor said it would balance itself out over time with proper medications which it has.
>
> THE COURT: What is your other understanding of other mental health diagnoses that you have received?
>
> McCULLAH: Basically that I'm competent to stand trial and represent my interests in my defense.
>
> THE COURT: I understand that you have been ruled competent, but that's really not my question. Other than ADHD, have you had any other diagnosis of a mental health condition?
>
> McCULLAH: No.
>
> THE COURT: Have you taken medications in the past?
>
> McCULLAH: Yes, Your Honor.
>
> THE COURT: For what?
>
> McCULLAH: I took medications for [ADHD], 1974-1977. I took Ritalin, and I've also taken Wellbutrin, Seroquel at the Polk County main jail, which to my knowledge is experimental—
>
> THE COURT: What do you take Wellbutrin [for]?
>
> McCULLAH: They diagnosed it as depression or hyperactive disorder.
>
> THE COURT: So you've been diagnosed with that as well?

> McCULLAH: Well, yeah. I question the legitimacy of the diagnosis, of course, but yeah.
>
> . . . .
>
> THE COURT: What is Seroquel for?
>
> McCULLAH: I have no idea. The psych doctor prescribed it in Polk County.
>
> THE COURT: Are you taking meds right now?
>
> McCULLAH: No.
>
> THE COURT: None?
>
> McCULLAH: No.
>
> . . . .
>
> THE COURT: And tell me why you don't want court-appointed counsel.
>
> McCULLAH: At this time because the prejudice that stems from my previous attorney, I don't feel that my best interest was represented to the fullest ability of the public defender's office. And I feel that there's issues that are controversial, and I don't feel that I would be receiving a fair, impartial trial with the best possible representation, no offense to co-counsel or standby counsel, but at this time I feel my best interest is to represent my own interests in this proceeding.
>
> . . . .
>
> THE COURT: You do still want to represent yourself?
>
> McCULLAH: Yes, Your Honor.
>
> . . . .
>
> THE COURT: You're responsible for your own representation.
>
> McCULLAH: Correct. Your Honor, I don't see the issues are that clouded that it takes a rocket scientist or very significant in-depth research to understand the scope and definition of the allegations. Wherefore, I find myself competent to stand trial to represent my interests in the proceedings.

The next day, the court entered an order allowing McCullah to represent himself and appointing standby counsel. The order stated:

> After conducting a colloquy with [McCullah] concerning his request to represent himself, the court finds that [McCullah's] request to appear pro se is knowing and intelligent. In addition, [McCullah] has signed a written waiver.[1] [McCullah] shall be allowed to represent himself in both these cases [(the sexual abuse case and the escape and inmate assault case)], with the Juvenile Public Defender's Office as standby counsel.

[1] The waiver was not provided in the appendix, nor could it be found in the original court record.

The court set the matter for trial on February 4, 2008.

On February 1, 2008, a pretrial motion hearing was held before Judge Don Nickerson. The court again revisited the risks of pro se representation with McCullah. The following exchanges occurred:

> McCULLAH: . . . . These allegations of incompetence are absolutely erroneous, in my opinion. I have suffered seven competency evaluations . . . . I don't feel that the psychological issue poses a problem for me representing my interest in the case.
>
> . . . .
>
> [STANDBY COUNSEL]: [Mr. McCullah], you have talked to the court about the court record and I have talked about the court record in our meetings; is that correct?
>
> McCULLAH: Yes, it is.
>
> [STANDBY COUNSEL]: And I have explained that when we attorneys, the judge, talk about court records, sometimes we talk about what's in the court file and we talk about what's said in court while the court reporter is taking down what we say; is that correct?
>
> McCULLAH: Yes, it is, Your Honor.
>
> [STANDBY COUNSEL]: And you have told me . . . based upon your understanding, when we are speaking in the microphones, all this is kept on tape?
>
> McCULLAH: It's kept on a dictal reel. I believe it's kept in a mainframe in the Polk County Court's basement that's known as the court record. There's also a transcript that is represented by the Clerk of Court. . . .
>
> . . . .
>
> [STANDBY COUNSEL]: Do you still believe there's a recording someplace?
>
> McCULLAH: Well, without, what I'll refer—the receiver echo in this courtroom, I don't believe—these would need to be actually looked into. Do they hook into a transreceiver somewhere?
>
> THE COURT: They hook into a receiver.
>
> [STANDBY COUNSEL]: When there's—everything was recorded for the record, and the court substantiates the court record, so it's my position that my pro se representation is also competent. I find no objection in proceeding pro se at this time.
>
> . . . .
>
> [STANDBY COUNSEL]: . . . . One of the motions that you talked about dismissing . . . was based on your statement that President Bush in his State of the Union address, in January of 2007, mandated that DNA evidence from more than [ten] years ago

cannot be used in criminal cases, something to that fact; is that correct?

McCULLAH: Yes, it is.

At this time, Your Honor, my attorney's question—my attorney's level of diligence—apparently there seems to be a question regarding my ability to represent my own interest in this case.

THE COURT: Stop right there. You are going to represent yourself pro se.

McCULLAH: Thank you, Your Honor.

THE COURT: [Standby Counsel] is only there as standby counsel, if you have any questions about the process.

Now, if—you decided to represent yourself pro se, you have been examined, you admitted, five or six times. I'm not going to send you back for another mental competency action, despite the fact that you have these bizarre beliefs. We're going to go ahead with trial.

McCULLAH: Thank you, Your Honor.

. . . .

[STANDBY COUNSEL]: The reason I'm bringing this up has to do with whether or not Mr. McCullah is competent to represent himself. I know that the evaluations that have been prepared have indicated that he understands, for purposes of that motion, the purpose . . . of the judge, and jury, and the defense attorney—and these are just examples of some of the statements Mr. McCullah has been making regarding his understating of how the law works.

. . . .

[STANDBY COUNSEL]: And the only reason I make these statements—and I think I'm walking on thin ice here—is because I think this did have an impact on whether he has sufficient understanding of how the law is to affect his ability to competently understand the legal process. He may understand the court system, as to who has what task, but in terms of understanding what the law is and where the law comes from, there's an issue.

And I have advised him of my positions on certain of these matters, and he's not in agreement with that. And that's where I think the issue of his being able to assist himself at trial, whether pro se or represented by an attorney, I don't know that he can because he doesn't understand where the law comes from or what the law says.

THE COURT: And, [standby counsel], I'm not quite convinced that he doesn't understand, by the dialog that I've just heard from him. And, number two, he doesn't have to understand the constitutional underpinnings and the relationship between the executive branch and legislative branch and judicial branch to proceed through this trial.

> He understands the dangers of proceeding pro se, and he understands the offense, he understands the courtroom proceedings, and I believe that's sufficient under the law. . . .

On February 4, 2008, the day of trial, the court met with parties prior to jury selection. The State requested the court again go through the pro se colloquy with McCullah to determine if McCullah wanted to proceed pro se. The court then conducted another colloquy with McCullah. McCullah again stated that he was competent to stand trial, that he understood what his court-appointed attorney could do for him, and that he waived his right counsel. The court allowed McCullah to proceed pro se.

Trial proceeded in the matter, and McCullah represented himself, questioning potential jurors, giving opening and closing statements, and cross-examining witnesses. McCullah had a defense strategy of challenging the DNA evidence and the honesty of the witnesses; however, he made several bizarre statements throughout the selection of the jury and trial.

After closing arguments, and outside the presence of the jury, standby counsel made a motion to the court, stating:

> The court has now had an opportunity to observe my client at trial, not just trial but through motions that have been made through the course of this trial. I made the argument before that I was not convinced and I still believe that my client was not competent to represent himself at trial, was not competent in trial. I ask the court to reconsider . . . based on what has been presented during the course of trial.
>
> . . . . I know Mr. McCullah was not in agreement with this in the past, . . . but I believe that the court should find that he is not competent to stand trial.

The State resisted, noting that McCullah clearly knew what his role was in the proceedings. Additionally, the State argued:

> At all stages of these proceedings, [McCullah] may not have represented himself well, he may not have represented himself effectively, that is his risk to take. And he has had two prior competency evaluations prior to the start of this trial by two different psychological professionals, both of who found [McCullah] met the standard of competency.

The court found McCullah to be competent "based on the fact that he had two prior competency evaluations and he was found competent to stand trial with respect to both." The court further explained:

> And also, I observed [McCullah] during these proceedings and he has had the ability to comb through legal arguments, factual arguments, and in explicit detail—excruciatingly explicit detail—to the point wherein he's understood, I believe, the charges, the trial process, and the testimony, the relevance of the evidence.
>
> And once again, the fact that Mr. McCullah chose to represent himself after being adequately advised of the perils of self-representation— . . . it doesn't give me a basis to conclude that he is somehow incompetent to stand trial, so I'm going to deny [standby counsel's] motion.

The jury ultimately found McCullah guilty as charged. McCullah subsequently filed a pro se motion to vacate the jury verdict, which the court denied. McCullah was then sentenced to a term of imprisonment not to exceed twenty-five years on each count, to be served consecutively. McCullah appeals.

II. Scope and Standards of Review.

Our review of constitutional claims is de novo. *State v. Cox*, 781 N.W.2d 757, 760 (Iowa 2010). However, our review of criminal sentences and compliance with Iowa Rule of Criminal Procedure 2.23(3)(*d*) is for correction of errors at law. *See* Iowa R. App. P. 6.907; *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996).

III. Discussion.

A. Self-Representation.

McCullah does not dispute he was competent to stand trial. Rather, McCullah asserts the district court erred in not considering, sua sponte, his mental impairment in determining whether to grant his request to waive his right to counsel and to represent himself at trial, relying upon *Indiana v. Edwards*, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345, (2008).[2] We note that the district court was without the benefit of the *Edwards* decision when it considered whether McCullah should be allowed to represent himself, as McCullah's trial and sentencing concluded some months before the Supreme Court issued its decision in *Edwards*.

We begin our discussion with these general principles. "A defendant has a Sixth and Fourteenth Amendment right to self-representation under the United States Constitution." *State v. Cooley*, 608 N.W.2d 9, 14 (Iowa 2000) (citing *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527, 45 L. Ed. 2d 562,

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[2] The State argues, among other things, that McCullah should be judicially estopped from asserting his argument here after he asserted in another appeal in his pro se brief that he should have been permitted to represent himself. *See State v. McCullah*, No. 08-0051 (Iowa Ct. App. Mar. 6, 2009) (finding in that case that "[b]ecause McCullah's request was not clear and unequivocal, the court was not required to engage McCullah in a *Faretta* colloquy" to allow self-representation), *vacated in part on other grounds*, 787 N.W.2d 90 (Iowa 2010). We find the principles of judicial estoppel inapplicable here. *See Tyson Foods, Inc. v. Hedlund*, 740 N.W.2d 192, 198 (Iowa 2007) ("[J]udicial estoppel applies only when the position asserted by a party was material to the holding in the prior litigation."). Although the prior litigation considered McCullah's request to proceed pro se, his mental health was not material to the holding in that case. *See id*. Moreover, if McCullah suffers from a severe mental illness, the illness may prevent him from recognizing such an illness. We note there is no question that McCullah's standby counsel questioned McCullah's ability to represent himself. We therefore find no merit in the State's argument and do not address it further. Additionally, we deny the State's motion regarding judicial notice of McCullah's previous argument in his previous appeal.

566 (1975)). Before the right to self-representation attaches, a defendant must voluntarily, clearly, and unequivocally elect to proceed without counsel by knowingly and intelligently waiving his Sixth Amendment right to counsel. *See id*. (citing *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 581). A court has a "serious and weighty duty" to determine whether a waiver is competent and intelligent." *Id*. at 15. In order to make this determination, the court must engage the defendant in a colloquy on the record "sufficient to apprise a defendant of the dangers and disadvantages inherent in self-representation." *State v. Stephenson*, 608 N.W.2d 778, 782 (Iowa 2000).

Nevertheless, even where the invocation of the right of self-representation meets these requirements, "*Faretta* itself and later cases have made clear that the right of self-representation is not absolute." *Edwards*, 554 U.S. at 171, 128 S. Ct. at, 2384, 2384, 171 L. Ed. 2d at 353 (citations omitted). Relevant here, the Supreme Court in *Edwards* recognized a "mental-illness-related limitation on the scope of the self-representation right," holding "the United States Constitution permits judges to preclude self-representation for defendants adjudged to be 'borderline-competent' based on a 'realistic account of the particular defendant's mental capacities. . . .'" *Id*. at 171, 177, 128 S. Ct. at 2384, 2387-88, 171 L. Ed. 2d at 353, 357. Such defendants are "gray-area defendants," which are defined by the Supreme Court as defendants

> competent enough to stand trial under *Dusky* [*v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960),] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

Edwards, 554 U.S. at 177-78, 128 S. Ct. at 2388, 171 L. Ed. 2d at 357. The Court noted that the trial judge is "best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant." *Id*. at 177, 128 S. Ct. at 2387, 171 L. Ed. 2d at 357.

In *State v. Jason*, 779 N.W.2d 66, 73-74 (Iowa Ct. App. 2009), our court considered the issue of whether a trial court erred in not considering a defendant's mental impairment, as contemplated in *Edwards*, in determining whether to allow the defendant's request for self-representation. Like in the present case, the trial judge in *Jason* was also without the benefit of *Edwards* when it considered Jason's request to go pro se. *See Jason*, 779 N.W.2d at 73. Although the State urged that *Edwards* should not be applied retroactively, we found

> no reason not to apply *Edwards* under the criteria noted in *Everett v. Brewer*, 215 N.W.2d 244, 247 (Iowa 1974) (stating that retroactivity is a "function of three considerations[:] (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards"). Retroactive application here assures the defendant of a fair trial; can easily be administered by remand to the trial court; and law enforcement has not relied upon the old standard. *Id.*

We find this reasoning pertinent and therefore apply *Edwards* retroactively to the case at hand.

In *Jason*, we noted that that case, like this one, was the "obverse of *Edwards*," as the trial judge did not require the defendant to be represented by counsel but rather permitted the defendant to represent himself. *Jason*, 779 N.W.2d at 74. Nonetheless, we found that other courts had concluded:

> [W]hen a trial court is presented with a mentally ill or mentally incapacitated defendant who, having been found competent to stand trial, elects to represent himself, the trial court also must ascertain whether the defendant is, in fact, competent to conduct the trial proceedings without the assistance of counsel.

Id. (quoting *State v. Connor*, 973 A.2d 627, 655 (2009), and citing *United States v. Ferguson*, 560 F.3d 1060, 1068 (9th Cir. 2009) ("The standard for defendant's mental competence to stand trial is now different from the standard for a defendant's mental competence to represent himself or herself at trial.")). In so concluding, "other courts have remanded the proceedings to the trial court to conduct a hearing to determine the defendant's competency to represent himself or herself post-trial." *Id*. (citing *Ferguson*, 560 F.3d at 1070; *Connor*, 973 A.2d at 658-59; *State v. Lane*, 362 N.C. 667, 669 S.E.2d 321, 322 (2008); *cf. State v. Klessig*, 211 Wis.2d 194, 564 N.W.2d 716, 724-25 (1997) (pre-*Edwards*, but remanding for hearing on defendant's competence to proceed pro se)).

In the present case, there is no doubt that McCullah unequivocally stated and believed himself competent to represent himself. Moreover, there is no question McCullah made odd statements and spouted unusual beliefs at the hearings and trial. The district court and stand-by counsel had lingering doubts about McCullah's mental state. Although the State urges us to find McCullah did not suffer from a "severe mental illness" envisioned by the *Edwards* Court, we find, as we did in *Jason*, that determination is better suited for the trial judge.

Here, McCullah's self-reports of previous diagnoses of depression, schizophrenia, anxiety, and ADHD could be severe mental illnesses that could have compromised his ability to represent himself. More troubling is the psychologist's report from McCullah's second competency evaluation, which

stated: "[McCullah] also has prominent features of Antisocial Personality Disorder, including grandiosity, which causes him to overvalue his ability to represent himself and win his case at trial." McCullah argues on appeal that his odd behaviors, statements, and beliefs, including his belief that he alone could represent himself effectively at trial, could be manifestations of such a disorder that show he was not mentally competent to represent himself. Appellate counsel draws our attention to missed issues, including the elements of the degree of sexual abuse charged. We share these concerns.

We find McCullah may be a "gray-area" defendant who was competent to stand trial, but may or may not have been competent to take on the expanded role of representing himself at trial. *See id*. at 75-76; *see also Edwards*, 554 U.S. at 177-78, 128 S. Ct. at 2388, 171 L. Ed. 2d at 357. Although the trial court was diligent in verifying McCullah was competent to stand trial and touched on McCullah's mental health numerous times, our review of the record shows the court did not expressly consider whether McCullah suffered from a severe mental illness such that the court would not have allowed him to represent himself. Again, we note the trial court was without the benefit of *Edwards*. We therefore remand to the trial court for a hearing to determine whether McCullah was competent to represent himself at trial in light of the standards established in *Edwards*[3] and subsequent cases that have recognized a constitutional violation

[3] As we noted in *Jason*:

> We emphasize that the issue to be decided on remand is not whether the defendant lacked the technical legal skill or knowledge to conduct the trial proceedings effectively without counsel. . . . That fact, however, has no bearing on whether he was competent to represent himself for purposes of *Edwards*. Rather, the determination of his competence or lack thereof must be predicated solely on his ability to

when a defendant who is not competent to present his own defense without the help of counsel is allowed to do so. In making such determination, the court must be mindful that self-representation by a defendant who lacks mental capacity undermines "the most basic of the constitution's criminal law objectives, providing a fair trial." *Edwards*, 554 U.S. at 176-77, 128 S. Ct. at 2387, 171 L. Ed. 2d at 357.[4] Moreover, the "proceedings must not only be fair, they must 'appear fair to all who observe them.'" *Id*. at 177, 128 S. Ct. at 2387, 171 L. Ed. 2d at 357 (citation omitted). If the court finds McCullah was not competent to represent himself at trial, the trial court shall grant McCullah a new trial.

***B. Pro Se Claims*.**

Additionally, McCullah raises some "arguments" pro se. However, those arguments that can be discerned from his brief were either not raised below or are not properly presented on appeal. *See* Iowa R. App. P. 6.903(2)(*g*)(3) (stating the argument section shall include "[a]n argument containing the

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> "carry out the basic tasks needed to present his own defense without the help of counsel"; [*Edwards*, 554 U.S. at 175-76, 128 S. Ct. at 2386, 171 L. Ed. 2d at 356]; notwithstanding any mental incapacity or impairment serious enough to call that ability into question. Of course, in making this determination, the trial court should consider the manner in which the defendant conducted the trial proceedings and whether he grasped the issues pertinent to those proceedings, along with his ability to communicate coherently with the court and the jury.

Jason, 779 N.W.2d at 76 n.2 (quoting *Connor*, 973 A.2d at 656).

[4] It is "[a] fundamental principle of law . . . that it is the duty of the courts to see that a person charged with a crime receives a fair trial." *State v. Lowder*, 256 Iowa 853, 859-60, 129 N.W.2d 11, 15 (1964). "[A]ll defendants have a right to a fair trial." *State v. Cashen*, 789 N.W.2d 400, 405 (Iowa 2010) (citing *Gentile v. State Bar of Nev*., 501 U.S. 1030, 1075, 111 S. Ct. 2720, 2745, 115 L. Ed. 2d 888, 923 (1991) (Rehnquist, C.J., dissenting in part)). "No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court." *Massey v. Moore*, 448 U.S. 105, 108, 75 S. Ct. 145, 147, 99 L. Ed. 135, 138 (1954). "[W]hen a mentally ill or incapacitated defendant is permitted to represent himself at trial despite his lack of competence to do so, the reliability of the adversarial process, and thus the fairness of the trial itself, inevitably is cast in doubt." *Connor,* 973 A.2d at 655.

appellant's contentions and the reasons for them with citations to the authorities relied on and references to the pertinent parts of the record . . . [and f]ailure to cite authority in support of an issue may be deemed waiver of that issue"); *see also State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997) ("Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal."). As a result, these claims of error are not preserved for our review.

***IV. Conclusion*.**

We conclude McCullah's pro se arguments are not preserved for our review. However, under *Edwards*, McCullah's competency to stand trial does not equate to competency to represent himself at trial. We therefore remand to the trial court for a hearing which may include the presentation of evidence, to determine if McCullah was competent to represent himself under the standards established in *Edwards*. On remand, if the trial court determines McCullah was not competent to represent himself, the trial court shall grant McCullah a new trial.

REMANDED WITH INSTRUCTIONS.